



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CRIMINAL APPEAL NO. 123 OF 2014

SAMUEL MAZERA.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

(An appeal from the conviction and sentence in Mombasa CM CR. Case No. 2512 of 2013 (Hon. J. Kamau RM) delivered on 26/5/2014)

J U D G M E N T

1. **Samuel Mazera (“the Appellant”)** was charged with the offence of defilement contrary to **section 8 (1)** as read with **section 8 (3) of the Sexual Offences Act No. 3 of 2006**. It was alleged that on 27/9/2013 in District (sic) of Mombasa County, the appellant intentionally caused his penis to penetrate the vagina of EM a child aged 7 years.
2. The appellant denied the charge and after trial he was found guilty and was convicted and sentenced to twenty years imprisonment. He has now appealed to this court against the conviction and sentence.
3. This being a first appellate court, the court is enjoined to re-appraise and evaluate the evidence afresh and arrive at its own independent findings and conclusions. In so doing however, the court must have in mind the fact that it did not have the advantage of seeing the witnesses. **(See Okeno v. Republic [1972] EA.**
4. The trial court allowed the complainant’s biological father to testify as an intermediary. **JM**, the father of the complainant told the court that he was called at about 6.30pm and told his daughter was unwell. He went home and found the complainant in pain. He examined her and found that her private parts were inflamed. The complainant told him that the juice vendor had put his penis in her private parts after giving her juice and fruits. That he did it behind the school when she was leaving school. The complainant was at the time aged 7 years.
5. On the material day, **PW3 EW** was at home when her daughter came from school. When she tried to bath her, the complainant refused and locked her legs. She found the complainant’s panties soiled with stains. She called **PW2** from work. Later, the complainant told them that a juice vendor had put his penis in her vagina. They reported the matter to the police. After some days, the complainant showed them the juice vendor whereby they called the police who arrested the appellant.
6. **PW4 Dr. Lawrence Ngome** produced the P3 form. The complainant was examined on 11/10/2013 and found that the hymen was broken. He opined that she had been defiled. **Dr. Fatuma Abdille** who examined the complainant found that the hymen broken. She filled the PRC form which she produced in evidence.
7. **PW6 CLP. Dorothy Onditi** investigated the case. She was assigned the case on 17/10/2013 when the complainant was brought to the station. She accompanied her to Coast General Hospital. A P3 form was filled using the PRC form. In her investigations, she established that a juice vendor had taken the complainant to his house and defiled her after giving her juice. The complainant had pointed out the appellant as the person who defiled her.
8. In his defence, the appellant told the court that he woke up and went to the school to do his business of selling juice. There were other 8 people also selling juice. Suddenly, all his colleagues left and two police officers came and arrested him. They took him to Changamwe police station and asked for a bribe of Kshs. 5,000/- which he refused to give. It is then that they charged him with the offence.
9. The appellant put forth 6 grounds of appeal. These were that; **the trial court failed to consider that his constitutional right had been violated; that the trial court failed to consider section 8(7) of the Sexual Offences Act; that the medical evidence did not support the charge of defilement; that the prosecution case was marred with contradictions and discrepancies; that the appellant was denied the right of cross-examination and that the trial court failed to consider his defence.**

10. The appellant submitted that at the time of the commission of the offence, he was 16 years old. That his right under **Article 53 of the Constitution** to be tried as a child had been violated. That he should have been sentenced to a Borstal Institution; that the complainant was examined on 11/10/2013 when the reddish marks in her vagina showed defilement might have occurred a few hours before examination, that there were discrepancies as to when the report was made to the police; that the matter proceeded without the appellant being given the opportunity to cross-examine the witnesses on the documents relied on.

11. The state submitted that there was evidence of penetration; that since the offence occurred in broad daylight, the identity of the appellant was not in question. As regards the appellant's age, there was no evidence that he was a minor.

12. The first and second grounds are inter-twined. The appellant alleged that he was aged 16 years when the offence is said to have been committed but he was not tried as a child. The record shows that when the appellant appeared in court, the court ordered for him to be examined with a view to determine his age. The examination revealed that he was above 18 years. The age assessment report dated 5/12/13 showed that his approximate age was 18 years. The offence was alleged to have been committed three months before the report was made, to wit, 27/9/13.

14. In this regard, it will not be correct to allege that the appellant was a minor. It is the appellant who knew his age. He never disputed the age assessment report. Since the issue of age was a fact in his special knowledge, under **Section 112 of the Evidence Act, Cap 80 Laws of Kenya**, it was for him to prove that fact which he did not.

15. Further, at no time did the appellant object to his being tried on the basis that he was a minor and that the provisions of the **Children's Act** applied to him. In this regard, the court finds that the rights of the appellant under **Article 53 of the Constitution** were never violated as alleged. Further, the provisions of **section 8(7) of the Sexual Offences Act** were not applicable as the appellant was not a minor. Those grounds fail.

16. The next ground was that the appellant was denied the opportunity to cross-examine the witnesses on the documents relied on. The court notes that on 17/2/2014, the appellant confirmed to the trial court that he had received all the witness statements, the P3 and PRC forms. He had in his possession all these documents when he cross-examined the prosecution witnesses. The documents which the prosecutor stated to be missing were but on record. The court has seen them in the original record. That ground also fails.

17. The next ground was that the medical evidence did not support the charge. That while the act complained of is shown in the charge sheet to have occurred on the 27/9/2013, the P3 and PRC forms show that the complainant was examined on 11/10/2013. The appellant complained that the delay compromised the medical evidence.

18. The evidence on record is that the complainant came home on 27/9/2013 complaining of pain in her private parts. Her parents **PW3 and PW5** examined her and found that her vagina was inflamed. The complainant told them that a juice vendor had defiled her. The act was so traumatizing that the complainant was unable to relieve it. She broke down when she was required to testify the second time.

19. The complainant said she knew the person who had defiled her. Although **PW1** stated that the reddish marks on the vagina of the complainant meant that the act might have occurred the last previous few hours, she was firm that the hymen had been broken long before then. In my view, the medical evidence did not point to the defilement taking place on 11/10/2013, it only corroborated the evidence of the complainant as stated through the intermediary. The complaint was that it occurred on 27/9/2013. To my mind the delay in seeking medical examination did not weaken the medical evidence.

20. In **Republic v. James Agogo Obare [2017] eKLR**, Ngugi J. held: -

“It is important to address the appellant's third complaint; it is that the learned trial magistrate should not have relied on the evidence of PW3 – Dr. Eunice Mugweru – because she only examined the victim five days after the alleged offence had taken place.

This complaint is unavailing to the appellant. There is set number of days when a medical doctor is required see a victim of sexual assault of course, the salutary practice is for such a victim to be examined by a doctor as soon as possible so as to preserve evidence ...”

21. And in **JKK v. Republic [2015] eKLR** the Court of Appeal held: -

“Also the number of days before a child is examined by a doctor is really not decisive, what matters most is that the child was examined by a doctor and the findings of the doctor revealed that indeed the child was sexually assaulted based on the clinical findings, bruising of the genitalia, perforated hymen with foul smelling discharge”.

22. The other ground was that there were material contradictions in the evidence of the prosecution. That there was no evidence what offence was reported on 27/9/2013.

23. The evidence of both **PW3 and PW5** was that after the incident, they reported the matter to the police but the police said they were investigating the matter. The police only moved to arrest the appellant after the complainant was able to point out and identify the appellant as the juice vendor who had defiled her. The OB No. 33/17/10/2013 in the charge sheet in my view does not affect the prosecution case. The chain of events unerringly point to the defilement having taken place on 27/9/2013 only that the complainant took time to point out the perpetrator.

24. The other grounds in the petition as originally filed were that the prosecution case was not proved to the required standard and that the

appellant's defence was not considered.

25. In defilement cases, all that is to be proved is the age of the complainant, the act of penetration and that the accused is the perpetrator. In the present case, the complainant was said to be 7 years by the time she was defiled. A birth certificate no. 120923 was produced in evidence which showed that the complainant was born on 2/12/2004. She was 9 years when she was defiled. That is the age bracket under **section 8(2) of the Sexual Offences Act**.

26. On penetration, when the complainant came from school on the 27/3/2013, she complained of pain in her private parts. She locked her legs and would not want to bath. When asked, she told her parents **PW3 and PW5** that the appellant had put his penis in her vagina. When her parents examined her, they found her vagina inflamed. **PW1** later examined her and confirmed that her hymen was long broken. Clearly, there had been penetrative sex.

27. As to the identity of the perpetrator, as early as 27/3/2013, the complainant had stated that she was defiled by the juice vendor whom she knew by face but not name. The juice vendor used to sell juice in the complainant's school. The complainant pointed out at the appellant as the person who had defiled her on 27/3/2013.

28. As to his defence, the trial court considered the same at page 67 of the record. He stated that he had been standing alone when the police arrested him and took him to the station. That they asked for a bribe and when he failed to give the bribe they framed him with the charge before court.

29. In my view, the trial court quite rightly rejected the defence as weak and dishonest. The appellant did not deny that he was within the school on the 27/3/2013. He decided to concentrate on the date of arrest only. There was no reason that was advanced as to why the complainant and her parents would want to frame him with the offence.

30. In view of the foregoing, the court finds that the prosecution case was proved to the required standard.

31. Accordingly, the appeal is without merit and it is dismissed.

DATED and DELIVERED at Mombasa this 6th day of September, 2019.

A. MABEYA

JUDGE